United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-4090

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-4090

SEVERINO R. NICO, JR. and TERESITA V. NICO,

Petitioners-Appellants,

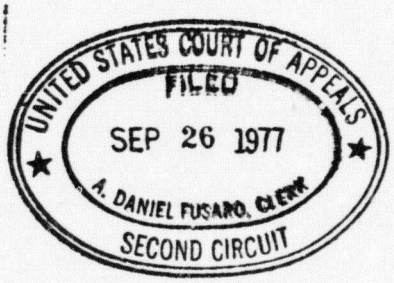
v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES TAX COURT

REPLY BRIEF FOR PETITIONERS-APPELLANTS



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UNITED STATES COURT OF APPEALS
FOR THE SECOND DISTRICT

SEVERINO R. NICO, JR. and TERESITA V. NICO, Petitioners-Appellants,	
v.	Docket No. 77-4090
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	

REPLY BRIEF FOR PETITIONERS-APPELLANTS

Petitioners-appellants, before May 2, 1971, were not "taxpayers", not "in existence" and not "nonresident aliens"; More case distinguished.

The court below erred in applying its opinion in the case of Jose E. More, 66 T.C. 27 (affirmed on appeal, Second Circuit, No. 76-4235, 6/24/77), to the instant case because there are basic differences in the facts of said case and this case.

Jose E. More was actually present in the United States during the early part of 1960 (the year in question) when the Tax Court held him to be a nonresident alien. He had been coming back and forth Cuba and the United States since 1958. In 1960, out of 75 days he was held to be a

nonresident alien he was actually in the United States for 32 days. He conceded and the Tax Court held him to be a nonresident alien and not a "taxpayer not in existence" during that portion of 1960 preceding the time he became a resident alien. The court then said:

> "It is clear, as petitioners concede, that section 443 does not apply herein. It is not enough that a nonresident alien may not have any tax liability because he has no taxable income from United States sources. The fact is that, as a category, nonresident aliens are subject to United States income tax, albeit that their liability attaches only to certain types of income. x x x " (underlining supplied)

In the instant case, petitioners-appellants (hereinafter "petitioners") were never actually present in the United States prior to May 2, 1971 (Stupulation of Facts, par. 3 and Supplemental Stipulation of Facts, par. 18). They argued in the court below that they did not have any status as taxpayers prior to May 2, 1971 because they had never been to the United States nor had any taxable income under the Code prior to said date. Jose E. More changed his status as a nonresident alien to resident alien on March 15, 1960. Petitioners commenced their status as resident aliens upon their arrival in the United States on May 2, 1971. The court rejected More's argument that he was not subject to United States income tax because Congress could indeed

impose any internal revenue tax on him, if it chose to. Petitioners herein neither were liable to nor subject to United States income tax prior to May 2, 1971. They were outside the United States territory and beyond the authority of Congress to tax. More, as a nonresident alien within the United States availed of governmental and public services and facilities; justifiably, he is subject to United States income tax. Petitioners herein, prior to their arrival in the United States on May 2, 1971, could not have availed of governmental and public facilities and services. There was no legal justification for Congress to subject them to income or any other internal revenue tax before they entered the United States. Thus, the Tax Court's rejection in the case of Jose E. More of the definition of taxpayer within the meaning of Section 7701(a)(14) as a person subject to internal revenue tax does not apply to herein petitioners.

As a nonresident alien within the United States prior to March 15, 1960, Jose E. More was definitely "in existence" in the United States. The phrase "in existence" cannot mean otherwise than "in existence in the United States"; it is not necessary for Congress to add the phrase "in the United States" just as it is not necessary to refer to the Internal Revenue Code as the United States Internal

Revenue Code. Congress' power to tax, just like any other country's law-making body's, is co-extensive with its territorial boundaries. With some exceptions (such as citizens or resident aliens or those who have income from United States sources), Congress has no power to tax persons outside its territorial boundaries. If Congress cannot tax a person, it does not take cognizance of that person and such person is not "in existence" as far as Congress is concerned. Petitioners reject respondent's arguments that the phrase "in existence" in Section 443(a)(2) refers to individuals who were not alive and who were born during the taxable year. Infants do not file income tax returns and Congress could not have possibly have them in mind when it enacted Section 443(a)(2) of the Code. Respondent's reference to Regulations §1.443-1(a)(2) is misleading because said section does not provide by example or otherwise that the phrase "in existence" refers to, among others, individuals who are born after the beginning of a year. Congress must have a good reason for using the word "taxpayer" and the phrase "in existence" in Section 443(a)(2) rather than employing words depicting particular situations such as a corporation or trust created or terminated during a taxable year, or individuals who become or cease to be taxpayers

during a taxable year. If Congress intended to limit the application of the phrase "in existence" to such obvious situations such as corporations or trust created or terminated or to individuals who died during the year, it would have so specifically provided. By using the word "taxpayer" which is defined in the Code and the phrase "in existence", it intended to allow those in similar situations - meaning those who file their first United States income tax return because they became in existence in the United States for the first time - to avail of this provision.

Petitioners herein accept respondent's policy of considering aliens who changed their status from a non-resident to that of a resident alien as Jose E. More did as having dual status during the taxable year that the change occurred, and such a change of status precludes them from availing Section 443(a)(2) which policy was supported by the Tax Court in the More case. But petitioners herein reject respondent's sweeping definition of the term "nonresident alien individuals" to include them who were outside the United States at all times before they became resident aliens upon their arrival on May 2, 1971.

Regulation §1.871-2 defines a nonresident alien

individual as follows:

> "(a) General. The term "nonresident alien individual" means an individual whose residence is not within the United States, and who is not a citizen of the United States. x x x " (underlining of "residence" supplied)
>
> "(b) Residence defined. An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purpose of the income tax. x x x " (underlining of "actually present" supplied)

These two definitions taken together means that an alien must be actually present in the United States in order to be considered as either a resident or a nonresident alien individual. The definition of "nonresident alien individual" is restricted by the second definition. This is only logical because of our earlier argument that the tax jurisdiction of Congress generally is confined within its territorial boundaries. Without this jurisdictional restriction, the term "nonresident alien individual" would mean by its definition that persons all over the world who are not United States citizen or resident are nonresident aliens and subject to the provisions of Section 871 et seq. of the Code entitled "Tax on nonresident alien individuals" which surely was not contemplated by Congress. While herein petitioners do not go to the extent of requiring actual presence in the United States at all

times in a taxable period in order to be classified as a nonresident alien individual, such as Jose E. More was during the early part of 1960 when he went back and forth Cuba and the United States, certainly the term cannot be applied to the instant petitioners who were never actually present in the United States at anytime prior to May 2, 1971 nor had any income taxable under the Code to be within the three classes of nonresident aliens enumerated in Regulation §1.871-1(b) which provides:

> "Classes of nonresident aliens: (1) In general. - For purposes of the income tax, nonresident alien individuals are divided into the following three classes:
>
> (i) Nonresident alien individuals who at no time during the taxable year are engaged in a trade or business in the United States,
>
> (ii) Nonresident alien individuals who at any time during the taxable year are, or are deemed under §1.871-9 to be, engaged in a trade or business in the United States, and
>
> (iii) Nonresident alien individuals who are bona fide residents of Puerto Rico during the entire taxable year."

The requirement of actual presence in the United States to be considered a nonresident alien is consistent with the meaning of the word "alien" as a foreigner*, a person of

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* Black's Law Dictionary, Fourth Ed., 1951

another race or place, or a stranger* - which presupposes actual presence in the country where he is an alien. This interpretation of the meaning of the term "nonresident alien individual" was adopted by the Department of Treasury and the respondent in its Publication 719, United States Guide for Aliens, Chapter One, which describes nonresident aliens as follows:

> "All aliens are considered nonresident aliens unless they acquire residence in the United States. The essential quality of a nonresident alien's stay in the United States is that of a presence as a transient or sojourner. In other words, he is merely a visitor for a short time." (Underlining supplied)

Nowhere in the Code nor in the Regulations is there any hint or suggestion that an immigrant arriving in the United States for the first time and filing his first United States income tax return is, prior to arrival, a nonresident alien individual. Respondent broadened the definition of the term "nonresident alien individual" to include herein petitioners who had not been subjected to United States income tax jurisdiction. Such application of the term "nonresident alien individuals" without the jurisdictional restrictions required by actual presence at some time is unwarranted by the Code, the Regulations and its own policy.

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* Webster's Third New International Dictionary (unabridged) 1961 Edition.

SUMMARY

The Code provides:

"Sec. 443. RETURNS FOR A PERIOD OF LESS THAN 12 MONTHS.

(a) Returns for short period. - A return for a period of less than 12 months (referred to in this section as "short period") shall be made under the following circumstances:

x x x

(2) TAXPAYER NOT IN EXISTENCE FOR ENTIRE TAXABLE YEAR. - When the taxpayer is in existence during only part of what would otherwise be his taxable year.

x x x "

First: Prior to March 15, 1960, Jose E. More was subject to internal revenue tax and under Section 7701(a)(14) which defines a taxpayer as such, he is deemed by the Tax Court to be a taxpayer.

Petitioners herein were neither liable to nor subject to any internal revenue tax prior to May 2, 1971 because they were outside the United States territory. Hence, they were not "taxpayers".

Second: Jose E. More was "in existence" in the United States as a nonresident alien. Petitioners herein were not "in existence" within the United States. They were outside the United States and beyond Congress' power

to be subjected to any internal revenue tax.

Third: Section 443(a)(2) must be employed by those who file their first United States income tax returns except those nonresident alien individuals who by respondent's policy are considered to have dual status in the year they changed their status from nonresident to a resident alien individual. (More case)

Fourth: Jose E. More was such a "nonresident alien individual" who was actually present in the United States as a transient or sojourner and on March 15, 1960 changed his status to that of a resident alien. Petitioners herein were not such "nonresident alien individuals" because they were not actually present in the United States as a transient or sojourner before they arrived as immigrants in the United States on May 2, 1971.

Fiftn: The terms "taxpayer" and "in existence" are broad and general terms to encompass the situation of any taxpayer filing his first income tax return because they became in existence in the United States for the first time except those who are precluded by expressed policy by the respondent. Consequently, they are available to persons in the situation of herein petitioners who arrived in the United States for the first time in their lives as immigrants

and therefore resident aliens on May 2, 1971.

Tax Court's Finding is Clearly Erroneous and Contrary to Law

Petitioner Severino testified that petitioners left Manila with the intention to move and work in New York City. Respondent argues such a testimony is subjective and not corroborated by the objective facts of the case. Respondent's argument is not supported by the record.

Intention is not the kind of fact that is normally documented or recorded at the time it existed in the mind of a person. Nevertheless, there are overt acts in the record of this case to support such intention aside from Severino's testimony as to why and how they arrived at the decision to move to New York City rather than elsewhere or in San Francisco where they stopped for over three months on their way to New York. For instance, is there any stronger evidence of intention than the fact that although both petitioners were employed in San Francisco, they resigned and left for New York City where they rented an unfurnished apartment and bought their own furnitures to furnish it and eventually worked in law offices? (Stipulations 11 and 12). If there was no such intention on the part of petitioners, would a

newly arrived immigrant couple in their right minds leave their jobs in order to take chances in New York City? This is not a case where petitioners went to San Francisco, disliked it there, then decided to move again to New York. The move to New York was conceived in Manila just as the stopover in San Francisco was also contemplated. Or else, why would petitioner Severino had thick suits for winter wear tailored in Manila if they were going only as far as California? (Tr. 23, L. 20-22)

In the case of A.&A. Tool Supply Co. v. Commissioner of Internal Revenue, 10th Circ., 1950, 182 F.2d 300, the issue before the Tax Court was the reasonable rental value of a property. The property owner was the only witness presented to testify regarding such rental value. The court agreed that the evidence was far from satisfactory but stated that the witness being the owner of the property had sufficient knowledge of its reasonable rental value. The court said:

> "The presumption that the Commissioner's determination is correct is one of law; it is not evidence and may not be given weight as such. N.Y. Life Ins. Co. v. Ganner, 303 U.S. 161, 171. When evidence is introduced by the taxpayer sufficient for the Tax Court to base a finding contrary to the determination, the presumption disappears. x x x The Tax Court may not arbitrarily discredit and disregard unimpeached, competent and relevant testimony of a taxpayer which is uncontradicted. There was sufficient evidence as to this item to

> overcome the presumption of correctness of the Commissioner's determination and the Tax Court should not have ignored it."

The Tax Court seemed to have relied heavily upon the negative fact that petitioners did not have an employment contract in New York before they left Manila or San Francisco and thus ignored the other evidence that petitioners' intention was to move and work in New York City rather than in San Francisco. Evidently, the court below in looking for an employment contract in New York to prove intention to live and work there judged petitioners' conduct from the standpoint of a native and long-time resident who customarily would not move to another state or area without such an employment contract. The court below seemed to have neglected the fact that in 1971 petitioners were newly arrived immigrants who were not yet rooted in the United States and would go where they could get the kind of employment they wanted. (see main brief, p. 24) This is exactly how the Tax Court and the respondent argued in a similar case, Tank v. Commissioner of Internal Revenue, 270 F. 2d 477, 6th Circ., 1959, in which the court noted that the Tax Court was looking for absent evidence and respondent was arguing as to what might have or should have been done. In reversing the Tax Court's

decision approving the Commissioner's determination of deficiency, the court said:

> "What we have attempted to do in this treatment of the present review is to point out some of the instances which illustrate the tendency of the Tax Court to ignore plain, uncontroverted testimony, and to reach for facts contrary to the testimony without there being any basis in fact for so doing. Certainly, the trier of the facts may disbelieve witnesses. We say, however, that the trier of the facts completely ignored or disregarded what appears to be a substantial quality of reliable testimony without giving any explanation therefore. x x x "

Severino explained in his testimony why they worked and stayed for over three months in San Francisco. That testimony is supported by documents in the record. The court below accepted the fact that petitioners waited in San Francisco for their personal belongings shipped by boat from Manila, their green cards from Honolulu, their money from their bank in Manila, and their retirement contributions from the Civil Service Commission in Washington. Nevertheless, the court held that there were other reasons why petitioners stayed in San Francisco. What those other reasons were do not appear in the record. The court below held that petitioners began to lay down permanent roots in San Francisco despite the fact that it was stipulated between the parties that petitioners rented a furnished apartment which they

continued to occupy throughout their entire temporary stay in San Francisco. The record also shows that petitioners did not purchase any single furniture or home appliance in San Francisco; it was in New York City where they made these purchases. Whatever facts were in the mind of the court which led her to the conclusion that petitioners "began to lay down permanent roots" in San Francisco were not properly presented at the trial nor stipulated upon by the parties. They are not in the record. Petitioners were not confronted with them and did not have any opportunity to impeach or contradict them. The court below thus deprived petitioners of their constitutional right to due process, the right of confrontation of evidence, the cornerstone of any civilized society's system of justice.

Every single statement of fact in petitioners' main brief is supported by evidence duly presented in the trial and are in the original record of the case. The nature and weight of petitioners' evidence may not be strong enough to convince a native and long-time resident of this country who cannot appreciate the difficulties of immigrants from half-way around the world who had never been previously to this country; but respondent had every opportunity to impeach and contradict them. Respondent's hindsight argument as to what

petitioners should have done to prove their intention to go to New York and not to San Francisco is out of place in this controversy. Tank v. Commissioner of Internal Revenue, supra. Petitioners ask to be judged on the basis of actual facts, not absent facts nor what might or should have occurred; and from the standpoint of unemployed immigrants who on May 4, 1971 left their hotel in San Francisco under pressure of large daily hotel and food bills and miscalculated the arrival of their personal belongings two weeks later. Such miscalculation can only result from inexperience in the United States aggravated by the fact that petitioners came from a developing country where a similar freight would be received from a sender in the United States four months from the time it was sent.

Dated: New York, New York
September 23, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEVERINO R. NICO, JR. and TERESITA V. NICO, Petitioners-Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	Docket No. 77-4090

I, SEVERINO R. NICO, JR., pro se petitioner-appellant, hereby certify that on the 26th day of September, 1977, service of Petitioners-Appellants Reply Brief was made by mailing three (3) copies to Respondent-Appellee by post-paid mail, addressed as follows:

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